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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC. and CHRONICLE PUBLISHING CO.,

Petitioners,

v.

OLIVIA NIEMI, a minor by and through her guardian Ad Litem,

Respondent.

ON A PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

This reply brief is submitted on behalf of Petitioners National Broadcasting Company, Inc. and Chronicle Publishing Co., in further support of their Petition for Writ of Certiorari and in response to Plaintiff-Respondent's April 3, 1978 "Reply to Petition for Writ of Certiorari in the Supreme Court of the United States."

The very arguments urged by Plaintiff-Respondent in opposition to the granting of a writ of certiorari underscore the importance of the issue presented for review, the error of the decision of the California Court of Appeal

of which review is sought, and the propriety of and need for immediate review by this Court.*

Such review would be inappropriate, Plaintiff argues, because the Court of Appeal correctly determined that "despite First Amendment protections" (R. Br. 10), broadcasters of the television drama "Born Innocent" might be held liable for civil damages because a scene in that drama is alleged to have given some individual an idea for a crime. As Plaintiff characterizes the asserted tort theory and the Court of Appeal's decision concerning it, Petitioners broadcast the drama "negligently and with recklessness"; "for this tortious act on their part they must pay damages" and, "[a]s stated by the Court [of Appeal], this has nothing to do with the First Amendment". (R. Br. 61)

Plaintiff does not rely on any prudential factors in opposing certiorari, but rather urges that "negligent" expression is simply unprotected by the First Amendment (R. Br. 10-24) or, alternatively, that a jury may award damages despite First Amendment protections where "negligent" expression results in injury (R. Br. 24-65) and, therefore, that the Court of Appeal correctly held that Plaintiff's claim could not be dismissed without a trial of the factual issue of negligence.

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* The arguments raised in Plaintiff-Respondent's Reply to Petition for Writ of Certiorari in the Supreme Court of the United States (hereinafter cited as "R. Br. ——") are, in certain other respects, either irrelevant or misleading. Thus, Plaintiff attributes to Petitioners certain arguments not advanced by them in the Petition (*see, e.g.*, R. Br. 44); refers to the supposed citation by Petitioners of cases not cited in the Petition (*see, e.g.*, R. Br. 49); and takes equal liberties in "quoting" the language of this Court. *See, e.g.*, R. Br. 17-19, purporting to quote the opinion of Mr. Justice Harlan dissenting in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 66-68, 29 L.Ed.2d 296, 325-26 (1971) and *compare* the actual language of that dissenting opinion.

Thus, Plaintiff characterizes the Court of Appeal as having correctly found the trial court in error in rendering a judgment that the First Amendment barred Plaintiff's claim as a matter of law, where the judgment deprived Plaintiff of the

> "'right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film "Born Innocent" resulted in actionable injuries.'" (R. Br. 10, *quoting* the decision of the Court of Appeal reproduced in Appendix A to the Petition at 6a)

Significantly, Plaintiff does not even attempt to characterize the Court of Appeal's decision as resting on any interpretation of the test for incitement set forth in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-48 (1969), or on the propriety of any determination with respect to incitement by the trial court. (*See*, R. Br. 10-13; 25) Nor does Plaintiff suggest that any test of incitement could be met in this case. Rather, Plaintiff simply asserts that a cause of action sounding in negligence may *never* be precluded, as a matter of law, by the First Amendment. (R. Br. 65; *see also*, "Questions Presented" at R. Br. 1-2) Plaintiff's theory of this case, as articulated in this Court and in the Court of Appeal, is well summarized by the submission that each case such as this one

> "must be looked at by itself and on its own facts just as any other negligence case is examined.
>
> "If two cars hit at an intersection under certain circumstances, one would not expect the Court to be comparing with what might happen to the impact of different types of cars hitting in different intersections at different times and under different circumstances.

There are acts of negligence in this case that would apply to this case and not to others." (R. Br. 26)

It would, we submit, be difficult to articulate a view more fundamentally at odds with the First Amendment or more likely, if adopted, to threaten the entire range of artistic and creative expression. Surely the First Amendment stands as a barrier to such an assertion of potential liability, particularly in a case where no assertion is even made concerning incitement or any intent to incite. That a tort should have been recognized by the Court of Appeal permitting a trial based on such a theory—as well as the all but inevitable filing of still more complaints and the holding of still more trials based on such theory—provides ample ground for review and reversal by this Court.*

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* Trial in this case was scheduled to commence in June, 1978; at the request of Plaintiff, it has been agreed by the parties, subject to Court approval, to adjourn it until August, 1978. The Superior Court of California in and for the City and County of San Francisco has indicated that it will reevaluate the question of when the scheduled trial will commence in light of the action of the Court with respect to this Petition.

CONCLUSION

For the reasons set forth in the Petition and this Reply Brief, a writ of certiorari should be issued to review the judgment and opinion of the California Court of Appeal.

Dated: April 17, 1978

Respectfully submitted,

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